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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

## BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

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## BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

This brief *amicus curiae* is filed by Westinghouse Electric Corporation (hereinafter "Westinghouse") with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

1. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

## INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse is engaged in the manufacture of industrial electrical equipment, consumer electrical appliances, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse is the defendant in various civil lawsuits presently pending in the United States District Court for the Western District of Pennsylvania in which issues have been raised which are similar to those presented in the instant case. The complaints in those suits alleged, *inter alia,* that Westinghouse has discriminated, and is discriminating, on the basis of sex by maintaining sickness and accident plans which exclude pregnancy from their disability income protection coverage, in violation of Title VII of the Civil Rights Act of 1964, as amended[2] (hereinafter "Title VII"). Plaintiffs in those cases, on behalf of a nationwide class, are seeking, *inter alia,* an injunction requiring the elimination of the pregnancy exclusion from Westinghouse's sickness and accident insurance coverage, and monetary damages for many prior years.

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2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*

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## QUESTION PRESENTED

Whether the exclusion of pregnancy from disability income protection plans violates Title VII of the Civil Rights Act of 1964, as amended.

## STATEMENT OF THE CASE

Liberty Mutual Insurance Company ("Liberty Mutual") provides as a fringe benefit of employment a Sickness and Accident Income Protection Plan which provides for the payment of income during periods of absence from work resulting from non-occupational "sickness" or "accident." Those benefits are not payable for

> "disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65."[3]

Respondents alleged in their Complaint that the denial of income protection benefits to female employees during absence from work due to pregnancy constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

The United States District Court for the Western District of Pennsylvania, on motion for summary judgment, held that the denial of income benefits during a woman's absence from work due to pregnancy does violate Title VII.

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3. Liberty Mutual Insurance Company, 1970 brochure on Sickness and Accident Income Protection Plan.

The Third Circuit Court of Appeals affirmed, relying heavily upon a 1972 Sex Discrimination Guideline issued by the Equal Employment Opportunity Commission ("EEOC").[4] The Third Circuit dismissed the applicability of this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974) on the grounds that *Aiello* was a case of constitutional analysis[5] and held that Liberty Mutual's income protection plan violates Title VII because it treats a protected class of persons in a disparate manner.[6]

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4. *Wetzel and Ross v. Liberty Mutual Insurance Company,* 511 F.2d 199, 205-206 (3d Cir. 1975).

5. *Wetzel, supra,* 511 F.2d at 203.

6. *Wetzel, supra,* 511 F.2d at 206.

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## SUMMARY OF ARGUMENT

In *Geduldig v. Aiello,* 417 U.S. 484 (1974), this Court held that a disability insurance system which excludes pregnancy, but includes coverage for men and women who suffer from other disabilities, is not sexually discriminatory.

This Court determined in *Aiello* that the relevant classifications resulting from the exclusion of pregnancy are "pregnant women" and "non-pregnant persons," and that such classifications do not discriminate on the basis of sex.

In the instant case the Third Circuit, looking at the same classification system, held that that system discriminated on the basis of sex. The Third Circuit erroneously dismissed the *Aiello* decision on the basis that *Aiello* had involved constitutional interpretation. The Third Circuit did not explain why the *Aiello* determinations of the relevant classification system and the effect of that system upon the sexes were determinations peculiar to constitutional analysis.

The *Aiello* determinations as to the relevant classifications and also that such classifications do not discriminate on the basis of sex are legal principles which were not dependent upon deference to the California legislature and are therefore as applicable to a Title VII case as they are to an Equal Protection case.

Moreover, there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans. Although the legislative history of Title VII's sex provisions is meager, the comments therein reveal that Congress did not take the view that the sex discrimina-

tion provisions are to be applied against every employer action which affects males and females differently. In addition, the legislative history of the proposed Equal Rights Amendment to the United States Constitution, which has been adopted by Congress, shows that Congress has explicitly disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

The EEOC's 1972 Guideline concerning pregnancy and childbirth, upon which the Third Circuit heavily relied, is entitled to no judicial deference. The Guideline constitutes a substantive regulation and as such is beyond the scope of the EEOC's statutory authority to issue procedural rules. In addition, prior to adopting the 1972 Guideline, the EEOC failed to give notice or solicit comments regarding the proposed rule as required by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553.

Even assuming the 1972 Guideline were a validly issued interpretative regulation, it would still be entitled to no judicial deference because it fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded administrative interpretations. The 1972 Guideline was adopted without solicitation of testimony or comments; it is inconsistent with the EEOC's prior opinions issued contemporaneously with the arrival of Title VII; and it is a judgment upon a pure question of law—a matter which is for the courts.

The Third Circuit's opinion also involves important social policy considerations which effect long-accepted employment practices and well-established legal principles. In the instant case the Court of Appeals held that



because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Court of Appeals' decision it is irrelevant that the employer may have acted without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirmed the decision of the Third Circuit, then it would be advising employers that an employment practice which disadvantages a subgroup of a larger group protected by Title VII is *per se* illegal even though the practice is undertaken for legitimate business reasons.

Accordingly, this Court should reverse the decision of the Third Circuit because (1) the Third Circuit's decision does not involve the elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce; (2) affirmance would create gross cost inequities between employers in states with public disability plans, such as that approved by this Court in *Aiello,* and employers in states which lack such a plan; and (3) affirmance would be inconsistent with the prior decisions of this Court which have recognized cost as a legitimate basis for employment practices.

When these policy considerations are added to the *Aiello* precedent and the strong congressional intent reflected in the legislative history of the Equal Rights Amendment, we submit that this Court should hold that the exclusion of pregnancy from a disability income protection plan is not a violation of Title VII.

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## ARGUMENT

### I. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Is Not Discrimination Between The Sexes Because The Exclusion Does Not Classify On The Basis Of Sex.

The Court of Appeals held, *inter alia,* that Liberty Mutual's disability income protection plan violates Title VII of the Civil Rights Act of 1964[7] "by excluding pregnancy benefits from coverage while including other kinds of temporary disabilities."[8] The Court below explained that although Liberty Mutual's plan is neutral on its face, it "treats a protected class of persons in a disparate manner."[9]

This determination by the Court of Appeals conflicts with prior decisions of this Court and is clearly erroneous.

This Court in the case of *Geduldig v. Aiello,* 417 U.S. 484 (1974), explicitly held that an insurance plan

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7. Title VII provides in pertinent part as follows:

"It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."

8. *Wetzel, supra,* 511 F.2d at 207.

9. *Wetzel, supra,* 511 F.2d at 206.



which excludes pregnant women, but includes both men and women who suffer from disabilities other than those related to pregnancy and childbirth, does not discriminate on the basis of sex.

The *Aiello* case involved a challenge to the constitutionality of the disability insurance system of the State of California under which benefits were paid to persons in private employment who were temporarily unable to work because of disability not covered by workmen's compensation. The California plan excluded from coverage disabilities that were attributable to pregnancy. The District Court held that the exclusion of such disabilities violated the Equal Protection clause of the Fourteenth Amendment.

This Court reversed, holding that the "pregnancy exclusion" did not constitute sex discrimination in violation of the Equal Protection clause. This Court stated that:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." [Footnote 20 is that of the Court.][10]

In footnote twenty to the *Aiello* opinion this Court explained its holding that the exclusion was not sex discrimination:

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10. *Aiello, supra,* 417 U.S. at 496-497.

> "The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[11]

In the instant case, the Third Circuit dismissed the applicability of *Aiello* on the grounds that *Aiello* was a case of constitutional analysis wherein deference was shown to the legislative judgment of the State of California in balancing public social welfare interests with the Constitution.[12]

It is true that a portion of the *Aiello* decision was devoted to a consideration of the significant economic costs that justified the decision of the California legislature to exclude certain disabilities related to pregnancy. However, the Third Circuit failed to recognize that the conclusion of this Court that the California plan did not involve sex discrimination was central to the Court's conclusion that the Equal Protection clause was not violated.

The Third Circuit's finding that the Liberty Mutual plan treats a protected class of persons in a disparate manner could have been reached only if (a) the Court below failed to accept the *Aiello* classifications quoted above or (b) the Court below, while accepting the *Aiello* classifications, nevertheless determined that a class of "pregnant women" may not be treated differentially under Title VII than "non-pregnant persons."

Both lines of reasoning are erroneous.

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11. *Aiello, supra,* 417 U.S. at 497.
12. *Wetzel, supra,* 511 F.2d at 203.



First, the Third Circuit erred if it failed to apply the *Aiello* classifications. This Court's determinations in *Aiello* of the relevant classifications resulting from exclusion of pregnancy and whether or not those classifications discriminate on the basis of sex are, in themselves, legal principles which are not dependent upon any economic analysis or legislative deference. These *Aiello* principles are therefore applicable to statutory interpretation as well as constitutional analysis.

Second, assuming the Third Circuit accepted the *Aiello* classifications, it erroneously concluded that a class of pregnant women may not be treated differently from other employees. Title VII prohibits discrimination on the basis of *sex*. This Court explicitly held, in *Aiello,* that "pregnant persons" is not a sex-based classification.[13]

Our interpretation of this Court's decision in *Aiello* is consistent with prior decisions of this Court.

In *Frontiero v. Richardson*[14] and *Reed v. Reed*[15] this Court did not deal with the question of "pregnant persons." Those cases both involved discrimination

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13. *Aiello, supra,* 417 U.S. at 496, n. 20 ("While it it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .").
14. 411 U.S. 677 (1973).
15. 404 U.S. 71 (1971).

based upon gender, as such,[16] and were expressly distinguished on this basis in *Aiello*.[17]

Similarly, in *Phillips v. Martin Marietta Corp.*,[18] the alleged discrimination was based solely on sex in that females with pre-school age children were subject to different hiring policies than men with pre-school children. The condition on which the alleged discriminatory action was based in *Martin Marietta, i.e.*, having pre-school children, was a condition which can and does occur among both males and females.

This Court's decision in *Cleveland Board of Education v. LaFleur*,[19] which involved a mandatory leave policy for pregnant teachers, is also clearly reconcilable with *Aiello*. First, *LaFleur* did not hold that the maternity leave regulations were sexually discriminatory within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Rather, this Court held that the Due Process Clause of the Fourteenth Amend-

16. *Frontiero, supra,* concerned the right of a female member of the uniformed services to claim her spouse as a "dependent" for purposes of obtaining increased quarters allowances and medical and dental benefits on an equal footing with male members. *Reed* involved the constitutionality of a mandatory provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate.

17. *Aiello, supra,* 417 U.S. at 496, n. 20. Distinguishable on the same basis are the recent decisions of this Court in *Stanton v. Stanton,* 43 U.S.L.W. 4449 (U.S. April 15, 1975) and *Weinberger v. Wiesenfeld,* 43 U.S.L.W. 4393 (U.S. March 19, 1975).

18. 400 U.S. 542 (1971).

19. 414 U.S. 632 (1974).



ment prohibited the state government, through the school system, from depriving a teacher of her job upon the basis of arbitrary unwarranted presumptions as to how long a pregnant person can work. Second, the restrictive maternity leave policies in *LaFleur* involved no legitimate cost variables to the employer to justify the withholding or termination of a job, whereas the conveyance of disability benefits is extremely costly.[20]

The Third Circuit's decision is inconsistent with this Court's opinion in *Aiello* and should be reversed.

## II. The Exclusion of Maternity Benefits From Disability Income Protection Plans Does Not Constitute Sex Discrimination Within The Meaning of Title VII Because Congress Did Not Intend To Outlaw The Exclusion.

Contrary to the assertions of the Court of Appeals,[21] there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans.

The legislative history of Title VII pertaining to "sex" is meager.[22] Certainly, there is nothing in that legislative history to suggest that Congress intended

20. *Brief, infra* at 33, n. 59.

21. *Wetzel, supra,* 511 F.2d at 205.

22. *Wetzel, supra,* 511 F.2d at 204.

The prohibition against sex discrimination was added as an amendment by Congressmen Smith of Virginia, probably in an attempt to defeat passage of the entire bill. The amendment was quickly adopted in the House by a vote of 168-133 after cursory debate which covers only nine pages of the Congressional Record. 110 Cong. Rec. 2484-92 (1964).

to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy.

The debate in the House is devoid of any mention as to how biological differences between the sexes would be resolved under Title VII. Congresswoman Green expressed her dismay that problems arising out of such differences had not been considered by the Judiciary Committee prior to its voting on the measure:

> "Because of biological differences between men and women, there are different problems which will arise in regard to employment. These should be carefully considered by the Committee. There will be new problems for business, for managers, for industrial concerns. These should be taken into consideration before any vote is made in favor of the amendment without any hearings at all on the legislation.[23]

The only comments regarding so-called "fringe benefits" of employment such as the disability income protection plan involved in this case negate a finding that the exclusion of pregnancy from such plans is sexually discriminatory. For example, Congresswoman St. George emphasized that women do not want or need special privileges.[24] Congresswoman Kelly[25] stated that she agreed with her colleague, Mrs. St. George, that "fringe benefit" [sic] and the protective laws of the several states would not be destroyed by favorable

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23. 110 Cong. Rec. 2491 (1964).
24. 110 Cong. Rec. 2488 (1964).
25. 110 Cong. Rec. 2490 (1964).



action on the amendment relating to sex discrimination.[26]

In the Senate, there was even less comment regarding sex discrimination. The legislative history in the Senate dealt essentially with an amendment offered by Senator Bennett to resolve "possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act."[27]

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26. The remainder of the House debate consisted mostly of comments by Southern Congressmen who opposed the Civil Rights Act and included citations to material provided by female proponents of the sex discrimination amendment to the effect that women, *qua* women, were provided no protection under the civil rights bill without the amendment. Every male member of the House voicing support for the inclusion of the amendment (110 Cong. Rec. 2485, 2490-2492) ultimately voted against the civil rights bill (110 Cong. Rec. 2708-2709).

27. 110 Cong. Rec. 13168 (1964). Senator Bennett stated that the purpose of his amendment was to provide that in the event of conflicts, the Equal Pay Act, 29 U.S.C. §206(d)(1), shall not be nullified. The leadership in charge of the bill favored the Bennett Amendment and it was adopted. *Id.*

There is no implication in the Equal Pay Act legislative history that an employer is prohibited from excluding maternity benefits from disability income protection plans. To the contrary, the Secretary of Labor's regulations under the Equal Pay Act exclude "payments related to maternity" from coverage as "wages" under that Act. 29 C.F.R. §800.110. Even if employer contributions for maternity benefits were considered "wages," the Secretary of Labor's regulations specifically approve benefit plans in which equal employer contributions are provided for male and female employees, even though "the benefits which accrue to the employees in question are greater for one sex than for the other." 29 C.F.R. §800.116(d).

Congress did not make any substantive changes with respect to the sex provisions of Title VII in the March, 1972 Amendments thereto. The Third Circuit inferred that such Congressional inaction in 1972 indicates a congressional intent to apply the broad purposes of the statute to sex discrimination and to strike at all discriminatory treatment of men and women.[28] The Third Circuit's analysis of congressional intent begs the question, however, since the issue is not whether Congress intended to provide equal employment opportunity for members of both sexes but whether Congress intended that the particular employment practice in question here constitutes a sexually discriminatory employment practice.

Moreover, the legislative history of the proposed Equal Rights Amendment to the United States Constitution ("ERA")[29] indicates that the denial of maternity

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28. *Wetzel, supra,* 511 F.2d at 204.

At least one other Court of Appeals has drawn the opposite inference from the Title VII legislative history. In *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. *en banc* 1975), the Fifth Circuit *en banc* stated:

> "We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate."

29. The ERA requires that:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."



benefits should not be regarded as discriminatory on the basis of sex.

The legislative history of the ERA constitutes credible evidence of the intent of Congress with respect to sex discrimination matters since the Amendment has been adopted by both houses of Congress.[30] This Court has held that subsequent legislation is entitled to weight in construing the intent of an earlier law dealing with the same subject. *F.H.A. v. The Darlington, Inc.,* 358 U.S. 84, 90 (1958); *Glidden Company v. Zdanok,* 370 U.S. 530, 541 (1962); *Great Northern Railway Co. v. United States,* 315 U.S. 262, 277 (1942).[31]

The legislative history of the ERA clearly shows that Congress has disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

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30. The House approved the ERA by a vote of 354-23. H. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. H9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S. J. Res. 122, 92d Cong., 2d Sess., 118 Cong. Rec. S4612 (daily ed. March 22, 1972). The Amendment has been submitted to the states for ratification.

31. The cases cited by Respondents in their "Brief In Opposition To The Petition For Writ Of Certiorari" (p. 12, n. 4) in support of the view that reliance upon the legislative history of the ERA is improper are clearly distinguishable. In *United States v. Lincoln Rochester Trust Company,* 297 F.2d 891 (2d Cir. 1962), *cert. denied,* 369 U.S. 887 (1962) and *Interstate Natural Gas Co. v. Federal Power Commission,* 156 F.2d 949 (5th Cir. 1946), *affirmed* 331 U.S. 682 (1947), the courts disapproved the use of legislative history relating to statutory language which had not been adopted by Congress.

Fourteen of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208:[32]

> "The legal principal underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or overclassification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.' *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." [Emphasis added.]

The majority Report of the Senate Judiciary Committee characterized these "Separate Views" as stating "concisely and accurately the understanding of the proponents of the Amendment . . . ."[33]

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32. H. R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971) (hereinafter cited as H. R. Rep. No. 92-359) (The Separate Views).

33. S. Rep. No. 92-689, 92d Cong., 1st Sess. 12 (1972) (hereinafter cited as S. Rep. No. 92-689). The Senate Report includes several paragraphs from the Separate Views, including the one quoted above.



These Committee Reports were based largely on testimony given at hearings by a number of key supporters of the Amendment, including Congresswoman Griffiths, the sponsor of the ERA in the House. In her testimony, Congresswoman Griffiths explained that there must necessarily be certain limits on "sex discrimination" as that concept would be treated under the Amendment. In explaining what the Amendment would *not* do, she testified:[34]

> "Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex."

In response to questioning on whether the ERA would prohibit all classifications taking account of sex, Mrs. Griffiths again acknowledged the natural limitation on the scope of the Amendment:[35]

> "But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have

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34. Hearings before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) (hereinafter cited as ERA House Hearings).

35. ERA House Hearings at 51.

the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference."

Mrs. Griffiths' position was repeatedly adopted by other Congressional supporters of the ERA. Congresswoman Bella Abzug testified that the Amendment would retain sex-based distinctions "where the law could not possibly apply to both sexes, for example, as in the laws against rape."[36] Similarly, during the House debate, Congressman William Ryan pointed out:

> "The basic principle underlying the equal rights amendment is that legal rights must be determined by the actual attributes of an individual, not by sex. This principle does not preclude legitimate differentiation based on the unique physical characteristics of the sexes."[37]

This approach to the general question of what constitutes sex discrimination was endorsed by even those supporters of the ERA who claimed to prefer a broader, more "absolutist" application of the Amendment. Professor Thomas I. Emerson, Lines Professor of Law at The Yale Law School,[38] explained in testimony pre-

36. ERA House Hearings at 116.

37. 117 Cong. Rec. H9368 (daily ed. Oct. 12, 1971). To the same effect, see remarks of Congressman Drinan, *Id.* at H9374; Congressman Mitchell, *Id.* at H9378; Congressman Broyhill, *Id.* at H9383; and Senator Gurney, 118 Cong. Rec. S4394 (daily ed. March 21, 1972).

38. Professor Emerson and his co-authors were the first to articulate the "absolute" interpretation of the ERA. Brown, Emerson, Falk, and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971).



sented to both the House and Senate Committees that the Amendment would not prohibit legislation or other official action dealing with physical characteristics unique to one sex. He testified before the Senate Judiciary Committee that:

> "The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast overclassification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> "This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction, because he or she belongs to one or the other sex.
>
> "Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality."[39]

And in his testimony before the House Subcommittee, Professor Emerson stated:

> "[T]he equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. Thus

39. Hearings on S. J. Res. 61 and S. J. Res. 231, before the Sen. Comm. on the Judiciary, 91st Cong., 2d Sess. 298-99 (1970).

a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Such legislation does not, however, deny equal rights to the other sex. So long as the characteristics [sic] is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

"Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the equal rights amendment as demonstrating the nonviability of that proposal. Thus not only would laws concerning wet nurses and sperm donors be permissible but so would laws establishing medical leave for child bearing, though medical leave for child rearing would have to apply to both sexes. Laws punishing forcible rape, which relate to a unique physical characteristic of man, would remain in effect. So would paternity legislation. Laws dealing with homosexual relations would likewise be unaffected, for such laws also deal with physical characteristics pertaining only to one sex."[40]

Similarly, Lucille H. Shriver, Federation Director, The National Federation of Business and Professional Women's Clubs, Inc., observed:

"The significant point always is: Is the distinction one of sex alone or, is there something added or

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40. ERA House Hearings at 402.



some special function served. On this basis, for example, maternity legislation would not be affected by the equal rights amendment. Maternity legislation affects only females, but any man who could use it certainly would be thereby eligible. The fact is, that maternity legislation can be available only to women because they alone, physiologically, house the prenatal child and childcarrying is the criterion for maternity legislation."[41]

In view of the failure of the ERA to treat a matter such as that involved in this case as sexually discriminatory, it would be anomalous in the extreme to regard it as sex discrimination under Title VII. The legislative history of the ERA in this respect should be viewed as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

In summary, the above analysis of Congress' concept of sex discrimination under both Title VII and the ERA shows that the denial of maternity benefits from a disability income protection plan should not be regarded as discriminatory on the basis of sex.

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41. Prepared statement of Ms. Shriver presented to House Subcommittee, ERA House Hearings at 156. *Accord:* testimony of Betty Friedan, founder of National Organization for Women, Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. 493 (1970) ("The only full special protection that women need is in the matter of maternity and childbering [sic] and none of the so-called protective laws cover this. And furthermore, that is a functional distinction that the equal rights amendment wouldn't touch because men don't bear babies.")

## III. The 1972 Guideline Issued by the Equal Employment Opportunity Commission Concerning Disability Due To Pregnancy and Childbirth Is Not Entitled To Judicial Deference.

On April 5, 1972, the Equal Employment Opportunity Commission ("EEOC") issued its revised "Guidelines on Discrimination Because of Sex" to require that health or temporary disability insurance plans cover disability due to pregnancy or childbirth on the same terms as they cover other temporary disabilities.[42]

The Court of Appeals erroneously relied on the 1972 guideline concerning pregnancy and childbirth in holding that it is sexually discriminatory for an employer to exclude pregnancy benefits from a disability income protection plan that includes other kinds of temporary disabilities.[43]

The EEOC's 1972 guideline concerning pregnancy and childbirth is entitled to no judicial deference because (1) the guideline constitutes a substantive rule which the EEOC has no statutory authority to issue and it is therefore invalid; and (2) even assuming, *arguendo,* that the guideline were an "interpretative" rather than a "substantive" rule and as such within the EEOC's rule-making power, the guideline fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded such administrative interpretations.

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42. 29 C.F.R. §1604.10(b).

43. *Wetzel, supra,* 511 F.2d at 205-206.



### A. The EEOC Exceeded The Scope Of Its Authority In Issuing The 1972 Guideline Concerning Pregnancy And Childbirth.

Section 713(a) of the Act provides that the EEOC "shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions" of Title VII.[44] The original bill as reported out of the Judiciary Committee of the House of Representatives did not contain the word "procedural."[45] The word "procedural" was inserted on the House floor pursuant to an amendment offered by Congressman Cellar[46] and was intended as a mandate to the Commission that it was not to have authority to make substantive rules and regulations.[47]

The EEOC violated this congressional mandate when it issued its 1972 guideline concerning pregnancy and childbirth. The guideline constitutes a substantive legislative rule. It affects virtually all disability and sick

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44. 42 U.S.C. §2000e-12 (emphasis added).

45. H. R. Rep. No. 88-914, 88th Cong., 1st Sess. (1963).

46. 110 Cong. Rec. 2482 (1964). The original language was very similar to the rule-making authority of the NLRB as set forth in 29 U.S.C. §156:

> "The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter."

47. In *Dobbins v. Local 212, IBEW,* 292 F.Supp. 413, 449 (S.D. Ohio 1968), the Court observed:

> "We note first that the agency charged with the enforcement of Title VII, the Equal Employment Opportunity Commission, is authorized by Congress only to issue 'suitable *procedural* regulations.' That excludes substantive and the history of the adoption of the Act bears this out." (italics in original).

leave plans in effect in the United States[48] and represents a complete reversal of the prior EEOC policy and announced position.[49] More significantly, the guideline requires fundamental and drastic changes in industry insurance practices, not only by requiring the creation of a new insurance benefit but also by greatly increasing the cost of existing temporary disability insurance and sick leave plans.[50] The guideline purports to answer the ultimate legal question—whether the exclusion of pregnancy is, under Title VII, an illegal classification system—a question which Congress did not address and which the courts must answer. The guideline clearly exceeds the scope of a "procedural" regulation.[51]

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48. Title VII covers virtually all employers, both public and private, throughout the United States and almost every such employer in the United States either excludes absence due to pregnancy from sickness and accident benefit coverage or limits such coverage more strictly than coverage for sickness or accident. *See e.g.,* U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966).

49. *Brief, infra,* at 30.

50. *Brief, infra,* at 33.

51. Compare the EEOC guideline discussed in *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975) which consists of the EEOC's interpretation of specific statutory language in connection with the validation of an employer's pre-employment tests pursuant to §703(1) of Title VII. Unlike the guideline in *Albemarle,* the EEOC's 1972 guideline concerning pregnancy and childbirth is not based upon a provision in the statute. The EEOC testing guidelines were also adopted pursuant to extensive commentary and assistance from professional psychologists. No such outside testimony was sought by the EEOC on its 1972 maternity guideline. *Brief, infra,* at 31.



This Court has not hesitated in the past to invalidate administrative rules which exceeded the scope of agency authority. *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943); *Helvering v. Credit Alliance Corp.,* 316 U.S. 107, 113 (1942).

The guideline concerning pregnancy and childbirth is invalid for the further reason that the EEOC failed to comply with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §553, in issuing the guideline.

Section 4 requires that before an agency adopts a rule, notice must be published in the Federal Register and interested parties must be given an opportunity to comment. No such notice or opportunity to comment was given before the EEOC promulgated the 1972 guideline concerning pregnancy and childbirth.

The requirements of Section 4 apply to "substantive legislative rules and regulations" which "create law, usually implementary to an existing law." *Gibson Wine Co., Inc. v. Snyder,* 194 F.2d 329, 331 (D.C. Cir. 1952). Section 4 does not apply to an agency's "interpretative rules," which "are statements as to what the administrative officer thinks the statute or regulation means." *Gibson, supra,* at 331.

The EEOC has characterized its 1972 guideline concerning pregnancy and childbirth as "interpretative in nature."[52] This Court, however, is not bound by the label attached by the administrative agency but instead must look to such factors as the real effect of the rule, the source of authority for its promulgation, and the force and effect which attaches to the rule itself. *Hou*

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52. 37 Fed. Reg. 6836 (April 5, 1972).

*Ching Chow v. Attorney General,* 362 F.Supp. 1288, 1292 (D.D.C. 1973).[53] As discussed above, the Commission's 1972 guideline attempts to create a substantive employment standard which must be met by employers. Thus, even if the EEOC had the statutory authority to issue substantive regulations, the 1972 guideline concerning pregnancy and childbirth nevertheless would be invalid because it was not issued pursuant to the requirements of the Administrative Procedure Act.

### B. Assuming, *Arguendo,* That The Guideline Concerning Pregnancy And Childbirth Is Interpretative In Nature, The Guideline Is Still Entitled To No Deference By This Court.

Assuming, *arguendo,* that the EEOC's 1972 guideline concerning pregnancy and childbirth is "interpretative" rather than "substantive" in nature and that the EEOC possesses the statutory authority to issue an "interpretative" regulation, the guideline is, in any event, not entitled to judicial deference.

This Court has set forth various standards to be followed by the judiciary in determining the weight, if any, to be accorded an administrative agency's interpretation of a statutory provision.

In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court rejected the EEOC's interpretation of the phrase "national origin" in §703 of Title VII,

53. *See also Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942) ("The particular label placed upon [the commission's order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.")



explaining that deference to administrative guidelines must have limits where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question."[54]

In *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), a case involving certain interpretative judgments issued by the Wage and Hour Administrator under the Fair Labor Standards Act, this Court noted, *inter alia,* the following criteria to be considered in evaluating an administrative regulation: the degree to which the regulation involved judgment in an area where the administrator had special expertise; its consistency with earlier and later pronouncements; and the thoroughness of the agency's consideration.

Application of the *Espinoza* and *Skidmore* criteria to the EEOC's 1972 guideline concerning pregnancy and childbirth indicates that the guideline meets none of these criteria and should therefore be accorded no deference by the Courts.

First, application of the guideline concerning pregnancy and childbirth would be inconsistent with the intent of Congress. As discussed *supra* at 13-16, there is nothing in the legislative history of Title VII to indicate that Congress intended to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy. Moreover, when Congress re-enacted the Title VII legislation in March of 1972, the published opinions of the EEOC sanctioned the pregnancy exclusion. Also, the legislative history of the Equal Rights Amendment to the Constitution indicates that Congress does not intend that an

54. *Espinoza, supra,* 414 U.S. at 94.

employment policy or practice be held to constitute sex discrimination because it is based upon a sex-related physical characteristic such as pregnancy.[55]

Further, the subject matter of the instant guideline is not a matter as to which the EEOC has special experience or expertise. The guideline involves a question of law, *i.e.*, whether the classification of "pregnant persons" is sex discrimination. That question is for the courts not an administrative agency.

Next, the history of the issuance of the guideline in question indicates that the guideline is not entitled to the judicial deference normally accorded agency interpretations. The 1972 guideline is neither a contemporaneous nor a consistent construction of the statute.[56] Rather, the EEOC's contemporaneous position on the treatment of pregnancy under Title VII appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966.[57] The EEOC's position at that time (and up to April, 1972) was that an insurance plan or other benefit plan may exclude maternity as a covered risk, and such an exclusion would not be discriminatory.

Finally, as pointed out in Part III-A, *supra,* the EEOC did not comply with the notice and comment provisions of the Administrative Procedure Act before it promul-

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55. *Brief, supra,* at 16-23.

56. In *Udall v. Tallman,* 380 U.S. 1, 16 (1965), this Court noted that contemporaneous constructions of a statute are more likely to be given deference. In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court found it significant that the EEOC had once held a different view as to the meaning of the phrase "national origin."

57. *E.g.,* General Counsel Opinion Letter, December 9, 1966, which was reported in CCH Employment Practice Guide, December 21, 1966 at ¶17,334.44.



gated its 1972 guideline concerning pregnancy and childbirth. No testimony, comments or opinions were solicited with respect to the guideline.[58] The issuance of the guideline in such manner reveals that the guideline was not thoroughly or objectively considered.

In summary, judged by the above standards, it is clear that the EEOC guideline concerning pregnancy and childbirth is not entitled to judicial deference.

## IV. The Decision Of The Third Circuit Is Inconsistent With This Court's Prior Determinations That Cost Is A Legitimate Basis For Employer Conduct; In Addition, Affirmance Of The Third Circuit's Decision Would Have An Undesirable Effect Upon Long-Accepted Employment Practices And Well-Established Legal Principles.

The Third Circuit has held that because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Third Circuit's holding it is irrelevant that the employer may have acted

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58. Ms. Sonia P. Fuentes, the Chief of the Legislative Counsel Division of the EEOC at the time the Sex Discrimination Guidelines were promulgated, admitted that the EEOC had conducted no medical studies prior to issuing the guidelines, and that she was not aware of any financial studies conducted concerning the monetary impact of the guidelines on industry. The Office of Legislative Counsel drafted the guidelines, yet Ms. Fuentes had no expertise in medicine, economics, or labor relations. Deposition Testimony of Ms. Fuentes in *Newmon v. Delta Air Lines, Inc.,* 374 F.Supp. 238 (N.D. Ga. 1973). *See* "Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted," 24 *DePaul L. Rev.* 127, 130 (1974).

without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirms the Third Circuit, then it will be telling employers that a practice which operates to the disadvantage of some subgroup of a larger group protected by Title VII is *per se* illegal even when undertaken for legitimate business reasons.

We submit that this Court should not affirm the Third Circuit (1) because the Third Circuit's opinion does not involve elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce, as a matter of law, without regard to the wishes of the union or employees in respect to the manner of distributing employment benefits, (2) because affirmance would create an inequity between employers in states with public disability insurance plans such as that approved in the *Aiello* decision and employers in states which lack such a plan, and (3) because affirmance would be inconsistent with the prior decisions of this Court which have recognized cost considerations as a legitimate basis for business practices.

Employers, of necessity, cannot convey every fringe benefit possible to each group or sub-group of employees. In creating a benefits program, employers (and/or unions where there is collective bargaining) seek a balanced package of many benefits which best serve overall employee needs. In effect, since no benefits package can satisfy all wants of all employees, the parties seek to utilize the benefits dollars in the most effective manner, keeping in mind the needs of all the employees.

Disability income plans throughout the United States have consistently excluded or have strictly limited



coverage for absence due to pregnancy because of the relatively high cost of such coverage.[59] This Court has recognized that the increased cost of pregnancy coverage is a legitimate and rational basis for its exclusion. *Geduldig v. Aiello, supra,* 417 U.S. at 493-494. Private employers and unions, like the State of California in *Aiello,* also have a "legitimate interest" in distributing the available resources in such a way as to keep benefit payments at an adequate level for those disabilities that are covered, rather than to cover all disabilities inadequately.

If the decision of the Third Circuit is affirmed, employers as well as employees will be required to subsidize the decision made by a couple to have a child. Couples bearing children would, as a matter of law, receive a certain portion of the benefits package at the expense of those employees who are single, widowed, divorced, beyond the childbearing age, or who simply choose not to have children.

Affirmance of the Third Circuit's decision would also create gross inequities among employers in light of this Court's previous holding in *Geduldig v. Aiello,* 417 U.S. 484 (1974).

At least five states (including New York and California) administer disability insurance systems that pay benefits to persons in private employment who are

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59. It has been estimated by at least one insurance actuary that the *annual* cost of adding coverage of pregnancy to short and long-term disability income plans currently in effect in the United States would be $1.35 billion. *Gilbert v. General Electric Company,* 375 F.Supp. 367, 378 (E.D. Va. 1974), *petitions for cert. before judgment filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (Nos. 74-1589 and 74-1590), *affirmed* ..... F.2d ..... (4th Cir., June 27, 1975).

temporarily unable to work because of disability not covered by Workmen's Compensation.[60] *Geduldig v. Aiello* held that such state systems need not include coverage for disability resulting from normal pregnancy.[61]

In California, for example, employers have the option of providing their own insurance coverage[62] or having the employees make contributions to the state for state disability plan coverage.[63]

Under *Aiello* the California state plan need not provide disability insurance for pregnancy. If this Court affirms the Third Circuit, then there will be inequities between employees covered by the state disability insurance in California, for example, and the employees in that state covered by their employer's own plan.

An even greater inequity would be created to the disadvantage of employers in the 45 states where no state disability insurance option exists.

In short, affirmance of the Third Circuit's decision would create the anomaly that certain employers will be

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60. In addition to California (California Unemployment Insurance Code, §2601 *et seq.*) and New York (Workmen's Compensation Law, Art. IX, §200-242), Rhode Island (Rhode Island Temporary Disability Insurance Act, General Laws R.I., §28-39-1), New Jersey (Temporary Disability Benefits Law, N.J. Stat. Ann. §43:21-25) and Hawaii (Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392) also administer such disability insurance systems.

61. *Geduldig v. Aiello, supra,* 417 U.S. at 497.

62. California Unemployment Insurance Code, §3251.

63. California Unemployment Insurance Code, §2901.



statutorily required to include pregnancy as a covered risk under their disability insurance programs whereas certain other employers may insure through a state disability insurance system and thus need not provide disability benefit coverage for pregnancy-related disabilities.

Even if such inequities were acceptable, there is no reason for them to exist. *Aiello* held that the exclusion of pregnancy was not sex discrimination. There is no more reason for that exclusion to be sex discrimination when the practice is that of a private insurance plan than when the exclusion is in a state insurance plan.

Moreover, by requiring employers to include childbearing costs in their disability benefits plans, this Court would be advising employers that cost considerations are irrelevant in formulating employment policies or practices. Yet, this Court has permitted the use by employers of "legitimate considerations" such as cost in formulating policies, for example, in the areas of employee selection and promotion.

In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975), this Court held that the use of a testing device which accurately measured job ability would not violate Title VII regardless of whether a disproportionate number of minority applicants for the job were thereby excluded. The permissible criterion for judging the tests in *Griggs* and *Albemarle, i.e.,* job relatedness, is essentially based upon cost considerations to the employer since the specific purpose of personnel testing is to increase the effective use of a firm's manpower.[64] Affirmance of the Third Circuit's decision,

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64. Guion, *Personnel Testing* 3 (1965).

*(footnote continued on following page)*

however, would reject the use by employers of such legitimate cost considerations.

Finally, if this Court affirms the decision of the Third Circuit, this Court will be advising employers that it is *per se* a violation of Title VII to have an employment practice which operates to the disadvantage of a particular subgroup (pregnant women) of a larger group (women) protected from discrimination by that statute.

This Court refused to adopt such a far-reaching theory of employment discrimination in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). In that case, a woman of Mexican origin and Mexican citizenship brought suit under Title VII against an employer who refused to hire her because she was not a United States citizen. Although the employment practice in *Espinoza* clearly disadvantaged persons of Mexican origin who were not United States citizens, this Court held that the employment practice did not violate Title VII because discrimination against aliens is not discrimination on the basis of national origin.[65]

By analogy, a disability income protection plan's classification on the basis of being pregnant is not classification on the basis of sex.

If this Court determines that the exclusion of pregnancy from income protection plans constitutes sex dis-

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*(footnote continued from previous page)*

Almost any individual could be put on many jobs if cost were irrelevant. The unqualified performer, however, would impose additional costs to the employer from, *inter alia,* poor performance of a specific job, disruption of other employees' normal workload, added administrative costs, extraordinary training or supervisory expenses, lost production, *etc.*

65. *Espinoza, supra,* 414 U.S. at 88-89.



crimination, the logical extension of such a theory of proscribed discrimination could be far-reaching. For example, under such a theory of discrimination, the practice of giving incentive pay to an employer's factory production workforce (which contains males and females) while offering no such incentive program to the employer's office clerical workforce (which might be predominantly or exclusively female) would be illegal. Similarly, the military service credit[66] would be suspect under Title VII since many more men than women have served or are serving in the uniformed services.

Further, affirmance of the Third Circuit's decision in the instant case would imply that employers could no longer lay off employees pursuant to a "last hired, first fired" clause of a collective bargaining agreement when application of the clause would result in the lay-off of a disproportionate number of racial and ethnic minorities and/or women because a large percentage of that employer's black or female workforce have been recent hirees.[67]

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66. Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, provides, *inter alia,* that private employers must reinstate former employees who are honorably discharged to their former positions or positions of like seniority and pay. (Section 8 of the 1940 Act was re-enacted in the Universal Military Training and Service Act of 1948 and again in the Military Selective Service Act of 1967 and is codified at 50 U.S.C.A. App. §459). For purposes of determining seniority, the returning veteran is to be treated as though he had been continuously employed during the period spent in the armed forces. *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 228 (1966).

67. In suits challenging such layoffs, the United States Courts of Appeals have found that the use of seniority to allocate layoffs does not violate Title VII.

*(footnote continued on following page)*

For all of the above reasons, this Court should reverse the decision of the United States Court of Appeals for the Third Circuit. The Court should not adopt a rule which makes it a *per se* violation of Title VII for an employer to adopt a policy which operates to the disadvantage of some subgroup of a larger group which is protected from discrimination by Title VII. This Court rejected such an approach in *Aiello*. It should reject that approach in the instant case.

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*(footnote continued from previous page)*

*E.g., Waters v. Wisconsin Steel Works,* 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064); *Jersey Central Power & Light Co. v. IBEW,* 508 F.2d 687 (3d Cir. 1975).

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## CONCLUSION

For the reasons set forth above, it is requested that the judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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